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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first this morning in Case 09-11311, Sykes v.  
5 United States. Justice Ginsburg is not on the bench,  
6 but will participate in the argument through the  
7 transcripts and the tapes.

8 Mr. Marsh.

9 ORAL ARGUMENT OF WILLIAM E. MARSH  
10 ON BEHALF OF THE PETITIONER

11 MR. MARSH: Mr. Chief Justice, and may it  
12 please the Court:

13 The Armed Career Criminal Act enhances the  
14 punishment for possession of a firearm or ammunition for  
15 a person who has three previous convictions for a  
16 violent felony. This case involves, as you know,  
17 vehicular fleeing, which Indiana has divided into five  
18 categories. Indiana statute treats vehicular fleeing as  
19 a continuum of behavior ranging from merely failing to  
20 stop on the low end, which is the crime Mr. Sykes was  
21 convicted of violating, all the way to fleeing which  
22 results in the death of a police officer on the high  
23 end, which in Indiana is a class A felony.

24 JUSTICE SCALIA: What's in between?

25 MR. MARSH: The second tier up is what we

1 refer to as (b)(1)(B), which is fleeing which either  
2 causes bodily injury or creates a substantial risk of  
3 bodily injury. The next category up is fleeing which  
4 causes serious bodily injury. The fourth category is  
5 fleeing which causes a death.

6 This Court recognizes --

7 JUSTICE SCALIA: So we can assume that the  
8 conviction here did not involve any risk of bodily  
9 injury to anybody?

10 MR. MARSH: That's our position, Your Honor.  
11 When the court considers the conduct encompassed by the  
12 elements of the offense --

13 JUSTICE SCALIA: Right.

14 MR. MARSH: -- then that conduct does not  
15 involve conduct which creates a risk of bodily injury.

16 JUSTICE KENNEDY: I'm sure you'll do so in  
17 the course of your argument, but at some point give us  
18 some examples of violations of -- of this, this statute,  
19 which from a commonsense standpoint don't involve a  
20 serious risk. There was something in the brief about,  
21 oh, well, the defendant might want to just find a safe  
22 place to pull over. I -- I didn't follow that because  
23 it's an intent crime. I just don't see how that would  
24 be a violation. But if at some point in your argument  
25 you could address those points.

1                   MR. MARSH: I would be happy to respond now,  
2 Justice Kennedy. The court -- the case that you  
3 referred to is the Indiana case of Woodward, from the  
4 Indiana Court of Appeals, in which the court held that  
5 exactly that conduct did violate this statute because  
6 the knowingly or intentionally the mens rea element goes  
7 only to fleeing and using a vehicle. So that was one  
8 example --

9                   CHIEF JUSTICE ROBERTS: Looking --

10                  MR. MARSH: -- of merely failing to stop.

11                  CHIEF JUSTICE ROBERTS: I'm sorry. Looking  
12 -- looking -- I don't mean to interrupt your answer.

13 Looking for a safe place to stop violates the statute?

14                  MR. MARSH: That was the holding of the  
15 Indiana Court of Appeals, yes.

16                  JUSTICE KENNEDY: You're supposed to stop  
17 dead in your tracks and not pull off on the shoulder? I  
18 mean, I don't -- I just don't understand this. I'll go  
19 read the case, but --

20                  MR. MARSH: Well, the court didn't --

21                  JUSTICE SCALIA: I don't drive in Indiana.  
22 I think that's pretty tough.

23                  MR. MARSH: The court did not elaborate,  
24 Your Honor, on where the line is, but --

25                  JUSTICE KENNEDY: Maybe that's why -- why

1 it's a risk. You stop in the middle of the road and  
2 then everybody --

3 (Laughter.)

4 MR. MARSH: That would be more likely to  
5 create a risk, but the --

6 JUSTICE SCALIA: How can you say somebody is  
7 fleeing? I mean, doesn't fleeing mean you're trying to  
8 escape the -- the officer?

9 MR. MARSH: Justice Scalia, the holding of  
10 the Indiana Court of Appeals was in response to a  
11 position taken by the defendant, sort of along the lines  
12 of the two lines of questioning, which is surely the  
13 statute requires something more than merely failing to  
14 stop, but the Indiana Court of Appeals used precisely  
15 that language.

16 JUSTICE ALITO: I think the problem with  
17 your argument is that the prosecution is not under any  
18 obligation to charge any offense greater than the  
19 offense for which your client was convicted in a case in  
20 which there is a very grave risk created by flight.  
21 Isn't that true?

22 MR. MARSH: The prosecutor is not under any  
23 obligation; was that the question, Justice Alito?

24 JUSTICE ALITO: Yes.

25 MR. MARSH: Yes, I think that's -- I think

1     that's correct.   The prosecutor --

2                   JUSTICE ALITO:   So the fact that someone is  
3     convicted of this offense does not show that a broad  
4     category of offenses within this crime lack the risk  
5     that's necessary under the Armed Career Criminal Act.

6                   MR. MARSH:   Well, I suggest that it does,  
7     Your Honor, because the -- the James case makes clear  
8     that the Court will determine whether the crime creates  
9     a serious potential risk of physical injury to another  
10    by looking at the conduct encompassed by the elements of  
11    the offense.   Now, the fact that some other offense  
12    maybe could have been charged or was charged I suggest  
13    on the categorical approach is not relevant.

14                  JUSTICE ALITO:   Are you familiar with the  
15    case called Hape v. State in the Indiana Court of  
16    Appeals 2009?

17                  MR. MARSH:   Tate versus --

18                  JUSTICE ALITO:   Hape.   H-a-p-e.

19                  MR. MARSH:   I'm not, Your Honor.

20                  JUSTICE ALITO:   During a 45 -- and this  
21    involved the offense at issue here.   During a 45-minute  
22    high-speed chase officers shot at the defendant's truck  
23    at least 20 times.   The State's facts showed that the  
24    defendant drove over 100 miles an hour and at times  
25    drove into the oncoming traffic lane.

1                   Do you think that creates a -- a serious  
2 potential risk of -- of harm?

3                   MR. MARSH: Well, those, of course, aren't  
4 the facts here. And I would have to know what the  
5 individual was convicted of because, of course, under  
6 the categorical --

7                   JUSTICE ALITO: I believe he is convicted of  
8 the same offense as -- as Mr. Sykes.

9                   MR. MARSH: But of course, under the  
10 categorical approach established by Taylor and followed  
11 consistently by this Court since that time, the Court  
12 doesn't look at the facts of the individual case. The  
13 Court looks at it categorically. So if --

14                  JUSTICE BREYER: But looking at it  
15 categorically I've always thought means you look to see,  
16 not just what the elements are on paper, but whether the  
17 elements as used in reality in the State are applied to  
18 cases that do present, in general apply to cases that do  
19 present a serious risk of physical injury. And you  
20 think the answer is we don't know because no one's gone  
21 and looked. You could do it through sampling, but no  
22 one's gone and looked. I've just said that's my view.

23                  The -- so what do we do? I mean, I can deal  
24 with a lot of other States, but Arizona has exactly the  
25 same classification of felony when you use a vehicle and



1 when you use a vehicle creating a serious risk of  
2 physical harm to others. It's in the same provision,  
3 same statute, same category. How do we work with that  
4 in your opinion?

5 MR. MARSH: If the --

6 JUSTICE BREYER: Are you following what I'm  
7 doing? You understand the difference between Arizona  
8 and 46 other States?

9 MR. MARSH: Yes.

10 JUSTICE BREYER: In the other States they  
11 grade it. But here they don't.

12 MR. MARSH: Right. Well, Indiana, of  
13 course, does grade it, Your Honor.

14 JUSTICE BREYER: Indiana, I'm sorry.

15 MR. MARSH: And it is significant that the  
16 second most serious category is where the conduct does  
17 present a substantial risk of bodily injury.

18 JUSTICE SCALIA: And I -- I don't know how  
19 we could proceed by looking at, you know, whether in  
20 fact a majority of the cases that come into this first  
21 relatively harmless category did indeed involve  
22 situations that involved physical risk because, as  
23 everybody knows, prosecutors plea bargain, and it's  
24 probably very often the case that the defendant is  
25 charged only under, under category one, you know, where

1 if he went to trial they would charge him under three;  
2 isn't that so?

3 MR. MARSH: But of course, Your Honor --

4 JUSTICE SCALIA: Yes, yes, you want to say  
5 yes.

6 MR. MARSH: Thank you. Yes.

7 JUSTICE BREYER: What I'm thinking of, and I  
8 need a little explanation, we look to see in (b), and it  
9 says it's a class D felony if a vehicle is used. That's  
10 (A) under (1). Am I right?

11 MR. MARSH: Yes.

12 JUSTICE BREYER: Okay. Then we look to (B\_)  
13 under (1), and it's also a class D felony, in other  
14 words the same, if a vehicle is operated in a manner  
15 that creates a substantial risk of bodily injury.

16 MR. MARSH: Yes.

17 JUSTICE BREYER: So a prosecutor looking at  
18 that will say, why don't I just charge A; what's the  
19 point of charging B? I mean, it makes no difference  
20 apparently. It's simpler to prove A.

21 MR. MARSH: Justice Breyer, in 2003, when  
22 Mr. Sykes was convicted of this offense, what you said  
23 is exactly right. Of course, we have no way of knowing  
24 the motivation of prosecutors generally, let alone in  
25 this case. And it really wouldn't matter what it was in

1 this case, what it is generally. But I think it's  
2 significant that in 2006 the Indiana General Assembly  
3 amended that statute so now the (B) violation carries  
4 with it a mandatory jail sentence, 60 days.

5 JUSTICE BREYER: I can deal with it more  
6 easily then. What's worrying me now is what we're  
7 supposed to do is, is the offense an offense that  
8 presents a serious risk of physical injury to another.

9 MR. MARSH: Yes.

10 JUSTICE BREYER: So we're here trying to  
11 decide whether the (A) one does.

12 MR. MARSH: Yes.

13 JUSTICE BREYER: And the answer is I don't  
14 know, and the reason I don't know is I don't know how  
15 that offense language of (A) is applied in Indiana.

16 MR. MARSH: It's --

17 JUSTICE SOTOMAYOR: Counsel, do you know if  
18 Indiana has an enhancement for convictions, sentencing  
19 enhancement of any kind, for conviction that have an  
20 element of risk of harm to others?

21 MR. MARSH: Your Honor, there are a number  
22 of habitual sentencing enhancements, one of which  
23 specifically relates to driving. I can't say that it is  
24 based on substantial --

25 JUSTICE SOTOMAYOR: So it's possible that

1    there is a -- there's a use of the difference between  
2    the two categories that might not be implicated in this  
3    case, but may lay the foundation for an enhancement  
4    later?

5                   MR. MARSH:   Yes.   That's a good point,  
6    Justice Sotomayor.   The enhancements generally in  
7    Indiana relate to previous convictions, and so I can't  
8    say for sure, but it's entirely possible that (B),  
9    (b)(1)(B), would be a predicate crime for a habitual  
10   traffic offender, which is what it's called.

11                   JUSTICE SOTOMAYOR:   In your brief you take  
12   issue with the government's definition of "aggressive,"  
13   but would you give us yours?

14                   MR. MARSH:   Well, Your Honor --

15                   JUSTICE SOTOMAYOR:   How would you define it  
16   and on what basis?

17                   MR. MARSH:   Your Honor, the best definition  
18   of "aggressive" that I've seen was in the First Circuit  
19   opinion in the Herrick case which is cited in our brief,  
20   which the First Circuit refers to as forceful action,  
21   especially where intended to dominate or master.   But on  
22   general everyday language, it strikes me that when a law  
23   enforcement officer wants somebody to stop, whether  
24   they're in a vehicle or not, the fight or flee sort of  
25   comes into play.   And the person who responds by going

1 toward the police officer and resisting in that way,  
2 which is the first part of this Indiana statute, would  
3 be acting in an aggressive way. The person who flees is  
4 not acting in an aggressive way. They're trying to  
5 avoid the confrontation, trying to get away from the law  
6 enforcement.

7 JUSTICE KAGAN: Mr. Marsh, I take it that  
8 you would agree that (b)(1)(B) is a violent felony  
9 under -- under ACCA; is that right?

10 MR. MARSH: Your Honor, it may very well be.  
11 It certainly would satisfy the risk element, similar in  
12 risk to the Begay case. I think it would still have to  
13 be decided whether it's violent and aggressive, but it  
14 may very well be.

15 JUSTICE KAGAN: Well, if we think that  
16 (b)(1)(B) is a violent felony under ACCA and we know  
17 that (b)(1)(A) and (b)(1)(B) can receive the same  
18 punishment, that they're both classed as a class D  
19 felony, why should we make the distinction between the  
20 two under ACCA?

21 MR. MARSH: Your Honor, I would suggest  
22 because the Indiana General Assembly has decided in  
23 enacting this legislation that some vehicular fleeing  
24 presents a substantial risk of bodily injury to another  
25 and some doesn't, and they've drawn this distinction.

1 JUSTICE SCALIA: I presume if --

2 JUSTICE KAGAN: But these are not nested  
3 offenses. These are not -- these are not lesser  
4 included offenses. Each has an element that the other  
5 lacks, and both are classed with -- apparently that the  
6 -- that the State thinks of them as equally severe. And  
7 if one is a violent felony under ACCA, there's an  
8 argument that the other should be treated in the exact  
9 same way.

10 MR. MARSH: Your Honor, I would suggest that  
11 the State doesn't treat them as equally severe. The  
12 range of punishment for a class D felony, which both of  
13 those crimes are, is all the way from zero to 3 years in  
14 prison, and the actual conduct undoubtedly is a factor  
15 in what the person's ultimate sentence will be.

16 JUSTICE SCALIA: And it may well be that in  
17 deciding whether to accept a plea bargain of being  
18 guilty of (A) rather than going to trial on B, if your  
19 client has two violent felonies already on the book, you  
20 might take -- take the plea bargain under (A) lest you  
21 run afoul of the Violent Felony Act.

22 MR. MARSH: Yes, Your Honor, that's of  
23 course entirely possible. But again, just as with the  
24 categorical approach, the Court cannot take into account  
25 the motives of prosecutors. I would suggest the motives

1 of defendants and defense lawyers can't be taken into  
2 account, either. Further, I think it's more important  
3 that when Indiana enacted this statute, it was not  
4 thinking of ACCA and predicate crimes, I assume. I  
5 don't think the legislature takes those kind of things  
6 into account.

7 JUSTICE ALITO: Suppose the legislature were  
8 to repeal (b)(1)(B). Would the offense for which Mr.  
9 Sykes was convicted then become an ACCA offense?

10 MR. MARSH: Your Honor, that would be a  
11 question that would have to be decided on the basis of  
12 whether there's some basis to -- well, first of all,  
13 determine whether it's violent and aggressive. My  
14 position would remain it's still not violent and  
15 aggressive. But even on the second part of the Begay  
16 approach, this Court has not seen anything that gives  
17 you any basis for knowing what the risk of injury is.

18 JUSTICE SCALIA: I don't understand your  
19 answer to that question. I would have thought that your  
20 answer if you're insisting on a categorical approach  
21 would be no, that there's nothing in, in (3) that  
22 requires any violence at all. Just fleeing by visible  
23 or audible means, just, just flees, that's all it says.

24 MR. MARSH: I'm sorry. I understood the  
25 question to be that (A) is repealed and (B) is left in

1 place?

2 JUSTICE ALITO: No, it's the opposite. If  
3 the aggravated offense -- you rely on the aggravated  
4 offense --

5 MR. MARSH: Right.

6 JUSTICE ALITO: -- in large part as a basis  
7 for your argument. Your argument -- one of your main  
8 arguments, as I understand it, is that what I'll call  
9 the simple offense doesn't qualify under ACCA because  
10 cases involving a serious risk of bodily injury fall  
11 under the aggravated category, and my question is  
12 whether a repeal of the aggravated offense would change  
13 -- would then convert the simple offense from a non-ACCA  
14 offense to an ACCA offense. Or you could ask it a  
15 different way. If State one has the simple offense and  
16 the aggravated offense, State two has just the simple  
17 offense, is the simple offense an ACCA offense in one  
18 State and not in the other State even though the  
19 elements are exactly the same?

20 JUSTICE SCALIA: That's a good question.

21 MR. MARSH: Your Honor, the equation would  
22 be different because of the significance of the (B)  
23 offense. So that's not exactly our case. But I will  
24 adopt Justice Scalia's answer, which I think is exactly  
25 right. I -- it still would not be something that's



1 violent or aggressive.

2 JUSTICE ALITO: But you're answering my  
3 question by making a totally different argument.

4 Insofar as you're relying on the aggravated offense, the  
5 presence of the aggravated offense, I would appreciate  
6 an answer to it.

7 MR. MARSH: Justice Alito --

8 JUSTICE ALITO: In other words, you're  
9 saying -- maybe I haven't made myself clear. Justice  
10 Scalia's answer, which you have adopted, is that if you  
11 look at (A) by itself, forget about the aggravated  
12 offense completely, it doesn't qualify under ACCA, and  
13 that's -- that's one argument.

14 But your other argument is that (A), the  
15 simple offense, doesn't qualify because of the presence  
16 of (B). And I'm trying to just see whether that makes  
17 sense.

18 MR. MARSH: Justice Alito, I think it breaks  
19 down to the two parts of the Begay test. In order to be  
20 a violent felony, it has to be similar in kind and  
21 similar in degree of risk.

22 The existence of (B) makes clear that the  
23 degree of risk for violating (A) is not the same,  
24 because if you accept the continuum of behavior as  
25 created by the Indiana General Assembly, the person

1 who's convicted of (A) has not created a substantial  
2 risk of bodily injury.

3 JUSTICE SOTOMAYOR: Counsel, have you done  
4 or looked at -- not every burglary has a risk of harm to  
5 another or results in harm to another. The general  
6 definition of burglary is entering without permission  
7 and intent to commit a crime, and generically the crime  
8 doesn't have to be physical injury to others.

9 MR. MARSH: Right.

10 JUSTICE SOTOMAYOR: Yet ACCA defines  
11 burglary as a qualifying crime of violence. It's  
12 measuring risk, not by the elements of that crime, but  
13 by something else, by some measure of incidents in which  
14 violence might occur.

15 So how is that different than the  
16 government's argument here and the question that Justice  
17 Breyer asked you, which was: It is true, potentially  
18 there's some forms of fleeing that might not pose a risk  
19 of injury, but statistically there's a large number of  
20 incidents in which violence follows.

21 So how is that different than burglary?  
22 That's really my question. What -- it can't be that the  
23 elements have to pose a risk of injury, because burglary  
24 doesn't do that. So what -- how do we measure it?

25 MR. MARSH: Your Honor, the inquiry, as the

1 Court said in James, is whether the conduct encompassed  
2 by the elements of the offense presents the risk, and  
3 that's the -- the determination that the Court has to  
4 consider.

5 It is not necessary, and I'm not contending,  
6 that this crime is a violent felony only if every  
7 conceivable violation of the statute constitutes a risk  
8 of danger.

9 JUSTICE SOTOMAYOR: So if you're not doing  
10 that, that's my question: Where do we draw the line?

11 MR. MARSH: You draw it -- I'm sorry?

12 JUSTICE SOTOMAYOR: Where do we draw the  
13 line?

14 MR. MARSH: You draw the line --

15 JUSTICE SOTOMAYOR: I think that was what  
16 Justice Breyer was trying to ask you earlier, which is:  
17 When do we say that, as in burglary, that some risk is  
18 more likely to follow than not in a particular type of  
19 crime?

20 MR. MARSH: The line is defined by the  
21 statute: Serious potential risk of physical injury to  
22 another.

23 Now, how do you make that determination?  
24 Well, the Court made clear in Chambers that empirical  
25 data is one way to do it. There isn't any here because

1 of all the empirical data presented by the government.  
2 It relates to vehicular fleeing as if there was one  
3 crime of vehicular fleeing, and most of it is -- is  
4 calculated based on death or injury, and that of course  
5 is not the category that we have here.

6 JUSTICE SCALIA: I suppose that if we agreed  
7 with you that whether it is a violent crime depends upon  
8 what other prosecutions for fleeing could have been  
9 drawn. If we agree with you that (1)(a) is negligible  
10 because there are other bigger ones for which he wasn't  
11 charged, we could leave open the question of what --  
12 what happens in a State that has only one crime for  
13 fleeing, and we would -- then we would have to confront  
14 the question that Justice Sotomayor has asked.

15 But if we accept your notion that -- where  
16 you have a gradation that is adopted by the State, the  
17 lowest gradation cannot be determined to have a high  
18 percentage of bodily risk, right?

19 MR. MARSH: Yes, that's correct, Justice  
20 Scalia.

21 JUSTICE BREYER: My problem is there is  
22 arguably not here a gradation.

23 Suppose it only had (A). If it only had  
24 (A), for me -- I'm not saying for you -- this wouldn't  
25 be a tough case. That is to say, I can't imagine a

1 person running away from a police in a car where there  
2 isn't a real risk to other people. He's speeding, you  
3 know. I would think -- I don't see how you get away  
4 from the policeman unless you speed, and there are going  
5 to be pedestrians. Who knows? But I think that was  
6 pretty -- at least as bad -- at least as much of a risk  
7 as burglary. So that would be the end of the case. It  
8 would be simple. At least assume that.

9 Now, then, however, suppose we have a State  
10 which says, but it's a worse thing to run away and  
11 create a risk, in a separate provision. It's a worse  
12 thing. All right? Then I would say, huh, now I'm not  
13 so sure. Why didn't they charge the worse thing? This  
14 must be reserved for cases where it isn't.

15 So here we have a rather weird situation.  
16 They're saying it's a different thing, but not a worse  
17 thing. So now I say: Well, why didn't they charge --  
18 now I don't know. I don't know why they didn't charge  
19 the separate special one. I don't know what the facts  
20 are. I'm puzzled.

21 Now, that's your case. That's where I  
22 needed the enlightenment. So what's the enlightenment?

23 MR. MARSH: Your Honor, it's not a weird  
24 situation because the Indiana definition of the crime of  
25 vehicular fleeing is not one all-encompassing crime.

1 It's -- they took the all-encompassing generic vehicular  
2 fleeing and divided it into five subparts, which I  
3 suggest makes it much easier to resolve the (b)(1)(A)  
4 question.

5 If there is no other categories, that would  
6 be Justice Scalia's point, I think, and then it would be  
7 a much harder question. And it may very well be that it  
8 would be considered a violent felony. For one thing --

9 JUSTICE ALITO: Isn't it still an empirical  
10 question? If we were to look at all of the cases that  
11 are prosecuted under what I'll call the simple offense,  
12 we might discover that those are all cases in which  
13 there is no serious potential risk of physical injury  
14 created because all of the risky cases are prosecuted  
15 under the aggravated label.

16 We might also find that there are still a  
17 great many cases that involve a serious potential risk  
18 that are prosecuted under the simple category. So the  
19 fact that there's a gradation doesn't allow us to escape  
20 the empirical issue, does it?

21 MR. MARSH: No, I think you're exactly  
22 right, Justice Alito. That would be possible.  
23 Empirical data could show what you have just suggested.  
24 Of course, that would be indicating that the Indiana  
25 General Assembly didn't have any rational basis for

1 dividing the two, but the important thing here is --

2 JUSTICE ALITO: I wouldn't say that they  
3 didn't have a rational basis for dividing it. It would  
4 just show a pattern of prosecution and plea bargaining.  
5 That's what it would show.

6 MR. MARSH: But the important thing here,  
7 Your Honor, is there simply is no such data before this  
8 Court. There is no empirical data regarding (b)(1)(A).

9 JUSTICE ALITO: There never is really  
10 reliable empirical data, almost never, for any of the  
11 issues that have to be decided under the -- the  
12 catch-all, the residual clause, of ACCA. It has to be  
13 based on basically common sense and experience, doesn't  
14 it?

15 MR. MARSH: Your Honor, I suggest that  
16 common sense and experience is not a reliable,  
17 predictable way of deciding these cases. You're right,  
18 there frequently is not empirical data. If there's not  
19 either empirical data that demonstrates the danger  
20 involved or a crime that -- where the danger is pretty  
21 obvious so that there would be widespread general  
22 agreement -- common sense is what has led to a lot of  
23 the conflicts in the circuits, I would suggest.

24 I reserve my time, Your Honor.

25 CHIEF JUSTICE ROBERTS: Thank you, Mr.

1 Marsh.

2 Mr. Wall.

3 ORAL ARGUMENT OF JEFFREY B. WALL

4 ON BEHALF OF THE RESPONDENT

5 MR. WALL: Mr. Chief Justice, and may it  
6 please the Court:

7 Just a very quick moment of history, I  
8 think, provides some useful background, and I'm on  
9 page 3A of the appendix to the government's brief.  
10 Until 1998, subsection (B), which we've been talking  
11 about, was the only class D felony that involved  
12 vehicular flight in Indiana law. In 1998 the Indiana  
13 General Assembly broke out and enacted subsection (A) so  
14 that in cases of vehicular flight prosecutors would not  
15 have to prove risk; they would just have to prove that  
16 defendant used a vehicle.

17 Since 1998, I have found 14 cases  
18 in the Indiana Court of Appeals, one of which is the  
19 Hape case that Justice Alito cited earlier. All of  
20 them, so far as I can tell, proceeded under (A) and not  
21 under (B). Of those 14 cases, 13 have enough facts to  
22 tell what the flight was -- of what kind. 10 involved  
23 speeding, disregarding traffic laws, or striking an  
24 officer with a vehicle. Of the other three, only one  
25 involved non-risky behavior, and even that was not a



1 defendant who drove a short distance and then pulled  
2 over. It was a --

3 JUSTICE SCALIA: These were all litigated  
4 cases?

5 MR. WALL: Yes, Justice Scalia, these were  
6 all litigated to conviction and taken up on appeal, and  
7 the Indiana Court of Appeals addressed various legal  
8 issues --

9 CHIEF JUSTICE ROBERTS: Well, but that's not  
10 -- 14 isn't very many. And I assume the vast majority  
11 of these cases aren't litigated.

12 MR. WALL: I think that's right, Mr. Chief  
13 Justice. The government's point is that here we have  
14 extensive data, both empirical and otherwise, that  
15 indicates that flight as a basic offense is very  
16 dangerous.

17 CHIEF JUSTICE ROBERTS: Well, I read your  
18 brief and I was -- I read your brief and was surprised  
19 that when you're -- the list -- one of the things you  
20 talk about to show that is media reports. You usually  
21 have a more concrete basis for -- for speculation than  
22 media reports.

23 MR. WALL: Mr. Chief Justice, if that is all  
24 we had put forward, I might agree with you, but we also  
25 put forward extensive statistical data.

1           My point is just that Indiana is typical.  
2   It's dangerous everywhere else. It's four times as  
3   dangerous as arson. It's more dangerous than household  
4   burglary. There's nothing different about Indiana. If  
5   one looks through these cases, these flights in Indiana  
6   are typically quite dangerous.

7           JUSTICE SCALIA: Suppose you have a State  
8   that has a separate crime for trespassing, criminal  
9   trespass, and you're saying that if -- if you could show  
10  that a large number of cases that were brought under  
11  criminal trespass in fact could have been prosecuted  
12  under burglary, then criminal trespass would qualify as  
13  a -- as a violent felony. That doesn't seem -- that  
14  doesn't seem to me right.

15           MR. WALL: Justice Scalia, I thought --

16           JUSTICE SCALIA: Just because prosecutors  
17  make that choice, that doesn't establish that the  
18  elements of the crime, which is what we focus on in  
19  deciding whether it's a violent felony, fill the bill.

20           MR. WALL: That's right, this Court looks at  
21  the conduct encompassed by the elements in a typical  
22  case. And in a typical case of vehicular flight what we  
23  have, according to the data, is someone fleeing police  
24  at an average of 25 miles an hour over the speed limit,  
25  someone who is in a typical case young, male,

1     unlicensed, under the influence of alcohol, and who  
2     places the lives of other motorists, pedestrians and  
3     police in harm's way.

4                     Your approach to ACCA, Justice Scalia, has  
5     been to look at the conduct encompassed by the elements  
6     and ask whether the risk from that conduct is at least  
7     as great as the -- the least risky enumerated offense.  
8     And here --

9                     JUSTICE SOTOMAYOR: That ignores the in-kind  
10    requirement of Begay, because you seem to be confusing  
11    the risk of violence with the in-kind inquiry, and  
12    that's where I'm trying -- I would like you to  
13    concentrate a little bit on, which is in burglary the  
14    defendant is breaking into generally a place and going  
15    without permission, with an intent to commit a crime.

16                    How is that comparable to merely not  
17    stopping when a police officer tells you not to stop?  
18    How is that an in-kind --

19                    MR. WALL: Justice Sotomayor, it's  
20    absolutely true, there are two parts to the test, and  
21    we've been talking about the first risk. On the second  
22    prong the purposeful, violent or aggressive character of  
23    the conduct, here I think there are three distinct  
24    things that make it purposeful, violent, and aggressive.

25                    First, you have the defiance of the

1 officer's order, which can cause injury at the scene.  
2 It has in some Indiana cases, but at least caused the  
3 officer to give chase.

4 Second, you have the very real prospect --

5 JUSTICE SOTOMAYOR: What you're doing is  
6 saying I'm not -- you're not even saying I'm not  
7 stopping, you're just driving away.

8 MR. WALL: Well, yes, but you are driving --

9 JUSTICE SOTOMAYOR: Now, how is that --

10 MR. WALL: You're driving away in response  
11 to an officer's command to stop. You're calling the  
12 officer to give chase. You -- you're -- pursuit is  
13 likely. And even when there isn't pursuit, these  
14 offenders drive typically very recklessly, and then  
15 you've got the confrontation when the officers have  
16 to --

17 JUSTICE SOTOMAYOR: But that's the risk  
18 of --

19 MR. WALL: -- terminate the flight.

20 JUSTICE SOTOMAYOR: That -- that -- that is  
21 all the risk question, and you're confusing the police  
22 actions with the defendant's, because you're talking  
23 about the defendant responding to a police pursuit. So  
24 what -- what is in the act of the crime that makes it  
25 in-kind to burglary?

1 MR. WALL: Let me analogize --

2 JUSTICE SOTOMAYOR: I concentrate on  
3 burglary because the others don't --

4 MR. WALL: No, let me concentrate on  
5 burglary, then, and analogize it to what this Court said  
6 in James. It said the risk of attempted burglary --

7 JUSTICE SOTOMAYOR: James -- James predated  
8 Begay. So --

9 MR. WALL: That's right, but I -- the Court  
10 has talked about, even in Chambers, about the risk of a  
11 violent confrontation with law enforcement officials,  
12 and it's done that under the Begay part of the test.  
13 And whereas that confrontation is only possible with  
14 burglary, it's necessary with this crime. It requires  
15 that an officer order you to stop and that you flee.

16 So that -- that confrontation, which is only  
17 a possibility with burglary or attempted burglary, is  
18 elevated to a certainty with this offense.

19 JUSTICE KAGAN: Well, Mr. Wall, wouldn't  
20 that suggest that if I just ran from a police officer,  
21 it would be a violent felony under ACCA?

22 MR. WALL: I think it -- it would suggest  
23 that, Justice Kagan, but I think flight on foot is  
24 unlikely to satisfy the risk part of the test. I think  
25 certainly this case is much easier on the -- the James

1 part of this test. I think the -- the flight in a  
2 vehicle poses risks, very real risks, to other motorists  
3 and pedestrians and police that flight on foot doesn't  
4 pose, although you would still have the confrontation  
5 when the flight on foot was terminated, so I think some  
6 of the arguments would translate, you're right. I think  
7 there would be more difficult questions, though, on the  
8 risk prong. This is a much easier case.

9 JUSTICE SCALIA: Do -- do words mean  
10 nothing? I mean, we're talking about a violent felony.  
11 That's what the Federal law requires. And -- and you  
12 want us to hold that failing to stop when a police  
13 officer tells you to stop is a violent felony. That --  
14 that seems to me a -- a -- a big leap. I mean, words  
15 have some meaning, and Congress focused on violent  
16 felonies.

17 MR. WALL: Justice Scalia, words do have  
18 meaning. But the words here are very broad: "Serious  
19 potential risk of physical injury to others." And as  
20 you yourself have recognized in -- in multiple opinions,  
21 what those words call for is a comparison of risk  
22 between an offense and ACCA's enumerated crimes.

23 This offense, simply put, is more risky.  
24 It's four times as risky as arson in terms of injuries  
25 and fatalities.

1 CHIEF JUSTICE ROBERTS: Well, one of the --

2 MR. WALL: It's more risky than household  
3 burglary.

4 CHIEF JUSTICE ROBERTS: Another word is  
5 "aggressive" in Begay, and that's where I have a little  
6 difficulty with your argument. It seems to me, this is  
7 the exact opposite of aggressive. He's running away.  
8 Certainly the other option is to turn and confront, and  
9 he doesn't want to. There's nothing aggressive about  
10 running away.

11 MR. WALL: Well, there is, Mr. Chief  
12 Justice, when you're doing it in a vehicle, and  
13 typically at high speeds. So, in Chambers --

14 CHIEF JUSTICE ROBERTS: Well, that's the  
15 risk of violence, I understand that, and purposeful,  
16 which I guess everything is. But those are the three  
17 words, "purposeful, violent, and aggressive." I'll give  
18 you purposeful, I'll give you violent, but aggressive?

19 MR. WALL: Mr. Chief Justice, if you give me  
20 those two I think we're home free, because this Court  
21 said --

22 (Laughter.)

23 MR. WALL: -- in Chambers --

24 CHIEF JUSTICE ROBERTS: I think you're  
25 two-thirds of the way home free.

1 (Laughter.)

2 MR. WALL: I'll take it and let's work on  
3 the last third. So the -- what this Court said in  
4 Chambers is not all attempts to evade authorities are of  
5 the same stripe. So, it contrasted escape from prison  
6 with failure to report. Failure to report, you could do  
7 at home on your couch; you could just fail to show up.  
8 And the Court said: Look, that's passive; it's a crime  
9 of inaction.

10 This is not that. It's not sitting at home  
11 on a couch. This is quintessentially a crime of action.

12 CHIEF JUSTICE ROBERTS: There's a  
13 difference. The opposite of passive is active. It's  
14 not aggressive.

15 MR. WALL: Well, but --

16 CHIEF JUSTICE ROBERTS: This is active.  
17 He's running away, but --

18 MR. WALL: I think --

19 CHIEF JUSTICE ROBERTS: What's the  
20 aggression?

21 MR. WALL: But it's very -- it's hard to see  
22 what the difference would be between this and escape  
23 from custody. And this Court clearly indicated in -- in  
24 Chambers that escape from custody was different from  
25 failure to report under the statute in front of it. And



1 I think this is as dangerous, maybe even more dangerous  
2 than escape from custody.

3 If the Court were going to say that all  
4 running away could not be aggressive within the meaning  
5 of that word for Begay purposes, so too escape from a  
6 maximum security Federal prison, which in some sense is  
7 just running away, but it is extremely aggressive and  
8 it's extremely risky to others.

9 JUSTICE KAGAN: Mr. Wall, do you think that  
10 speeding or drag racing qualifies under your  
11 understanding of the test?

12 MR. WALL: Justice Kagan, that's a difficult  
13 question. I don't know that I've seen any attempt to  
14 fit that offense in under the ACCA. I think that drag  
15 racing, where you're talking about speeds of 150, 160,  
16 170 miles an hour, might qualify, but I haven't seen any  
17 cases like that.

18 JUSTICE SCALIA: What about speeding, just  
19 -- you know, you're going 15 miles over the speed limit?

20 MR. WALL: I -- again, I --

21 JUSTICE SCALIA: Is that a violent felony?

22 MR. WALL: Justice Scalia, I think then we  
23 have a serious question about the first part of the  
24 analysis and the -- the risk test. I mean, 10, 15 miles  
25 over -- I mean, speeding as a generic offense is likely

1 to -- I mean, it encompasses categorically all speeding  
2 offenses, many of which are not that -- not likely to  
3 pose a serious risk to others. So I -- I -- we would  
4 have to look at the -- the data. What we do have here  
5 is data that says this offense is four times as risky as  
6 the enumerated offense of arson. So I -- I -- speeding  
7 would be a difficult case. So far as I know we -- the  
8 government's never tried to make the case.

9 JUSTICE ALITO: Is speeding a felony?

10 MR. WALL: Not as far as I know, not the  
11 basic offense. Now, whether in a Begay-type sense you  
12 might have some recidivism enhancement under State law  
13 that would get you there, I don't know. But I -- again,  
14 I haven't seen any case that involved that.

15 JUSTICE BREYER: Am I right? When you  
16 replied to Justice Scalia, I thought that he had said  
17 that we were dealing with a statute, and you seemed to  
18 agree, that said it is a crime to flee a policeman after  
19 being ordered to stop. But I thought we were dealing  
20 with a statute that says it is a crime to flee a  
21 policeman after being ordered to stop, in a vehicle.

22 MR. WALL: That's right. That's right.  
23 That's the offense here.

24 JUSTICE BREYER: And so you're -- okay.

25 MR. WALL: It's the vehicular flight

1 offense. And one -- you know, I will take one issue  
2 with -- with -- you know, what my friend on the other  
3 side has said, which is (A) and (B) are not tiered,  
4 they're not greater and lesser offenses under State law.

5 JUSTICE KAGAN: But Mr. Wall, suppose they  
6 were? I understand your point that they're not, and you  
7 might be right about that. But let's suppose that they  
8 were. Let's suppose you had a three-tier set-up. One  
9 was simple flight; one was flight that causes risk of  
10 injury; one that is a flight that causes injury. And  
11 let's even say that the simple flight -- no, let's --  
12 let's call them all felonies, but different classes of  
13 felonies.

14 What would happen in that case? Would you  
15 still be here saying that the simple flight felony is a  
16 violent crime?

17 MR. WALL: Yes. It's a tougher case, but we  
18 would be here saying that, because when you're looking  
19 at an offense categorically, for instance arson, you've  
20 got to look at all fires, all intentionally set fires,  
21 the ones that don't hurt anybody, the ones that do, and  
22 the ones that kill people, even though the fires that  
23 kill people will be prosecutable in most jurisdictions  
24 as a greater offense, like felony murder. And so when  
25 you're looking at it categorically you have got to look

1 at all of the conduct in that category, even conduct  
2 that may be prosecutable under some greater offense.

3 I think, you know, the other side sort of  
4 relies on this assumption that all conduct which might  
5 satisfy the greater will necessarily be prosecuted under  
6 the greater; and as a legal matter, it's included within  
7 the lesser and as a factual matter it's just not true  
8 that it always gets prosecuted under that greater  
9 offense.

10 So it would be a tougher case. It would  
11 make our case more difficult, but I think legally and  
12 factually the government's answer would be the same.

13 JUSTICE KAGAN: I -- I asked my clerk to  
14 just do a survey of the States, and he came up with --  
15 and I'm sure that this is rough -- but that 46 of the  
16 States have these tiered systems. Now, there may be  
17 some questions as to some of them, like you've raised  
18 some questions about Indiana's, but that 46 States  
19 essentially conceive of this as two different kinds of  
20 conduct, one which is the violent kind and the other  
21 which is the not violent crime.

22 MR. WALL: Well, my State law research is a  
23 little different from your clerk's. I've got 37 States  
24 and D.C. But the -- the point is that under the nested  
25 statutes, the aggravator isn't always like this one,

1 risk. Sometimes it's, as in Indiana, injury or death.  
2 And where you're talking about actual injury or death,  
3 those aggravators far outstrip the level of potential  
4 risk that ACCA requires.

5 So I don't think in those States Petitioner  
6 would give an argument that those aggravators would  
7 affect at all the analysis of the basic offense. There  
8 are a handful of States that, unlike Indiana, have as an  
9 aggravator risk, though even some of those States treat  
10 the basic offense as a felony, which is I think a  
11 judgment by the State that, even in the basic case this  
12 is risky conduct, deserving of severe punishment under  
13 State law. So, you know, there are nested statutes.

14 JUSTICE SCALIA: Not necessarily risky.  
15 Conduct that shows disrespect for the law.

16 MR. WALL: Justice Scalia, I mean I --  
17 again, I think it is significant that in 1998 the  
18 General Assembly broke this out as a separate subsection  
19 and said: We're not even going to require prosecutors  
20 to prove risk. I think that represents a judgment by  
21 the State that the conduct is risky on a typical basis.  
22 We just want the State to prove you used a vehicle.

23 JUSTICE SCALIA: Or even if it isn't risky,  
24 you should not thumb your nose at the police when they  
25 tell you to stop.

1                   MR. WALL: Well, that's right, and the  
2     reason --

3                   JUSTICE SCALIA: Risky or not.

4                   MR. WALL: The reason you shouldn't, Justice  
5     Scalia, is because that's the kind of purposeful,  
6     violent, and aggressive conduct the State wants to deter  
7     by treating as a felony. But I -- I mean I -- whether  
8     one looks at the risk prong and the data and the cases  
9     in Indiana or elsewhere, or whether one looks at the  
10    character of the conduct, this offense is just different  
11    in both degree and kind from the offenses that this  
12    Court has said fall outside of ACCA's residual clause.

13                   It's much more like escape from custody,  
14    it's much more like the enumerated offenses. Indeed,  
15    the risk of confrontation is certain. I mean, I -- it's  
16    important, I think, that -- I mean I -- these flights  
17    are not calm affairs. They're dangerous events. The  
18    average speed that the offender is traveling nationwide  
19    is 25 miles an hour over the speed limit. This is  
20    someone who on average is young, unlicensed, influenced  
21    by alcohol --

22                   CHIEF JUSTICE ROBERTS: I thought there was  
23    -- I don't know where -- I don't remember where it was  
24    from. I thought there was a development of best police  
25    practices that you don't just chase people. You know,

1 if they're going 30 miles an hour over the speed limit  
2 through a school zone, that doesn't mean the police  
3 officer should do that. You know, you call ahead, they  
4 put these strips on the road, whatever.

5 MR. WALL: Mr. Chief Justice, that's right.  
6 I think police agencies have been struggling with this  
7 question, which is why there's a lot of data on police  
8 pursuits, frankly, especially in the last 10 or 15  
9 years. I think some of them are becoming more  
10 restrictive, and so the data picks up pursuits. It  
11 doesn't pick up all flights. And I think if there were  
12 sound evidence that when people were not pursued they  
13 were actually driving at low speeds and safely, that  
14 would affect the data, though not so much that it would  
15 move it outside of similarity to the enumerated  
16 offenses.

17 But I think the -- the -- the data is pretty  
18 good in indicating that the typical flight is -- really  
19 does pose a serious potential risk of physical injury to  
20 others, a risk that materializes more often than with  
21 other crimes that Congress clearly intended to fall  
22 within the ACCA.

23 JUSTICE ALITO: Could I ask you this: If a  
24 person is convicted of vehicular flight that causes  
25 death, is that aggressive conduct?

1                   MR. WALL: Yes, the government would say it  
2 is, Justice Alito.

3                   JUSTICE ALITO: Is the conduct there any  
4 different from the conduct when death doesn't result?

5                   MR. WALL: No, Justice Alito. The  
6 government's answer is that categorically the behavior  
7 is aggressive and that in some cases it will result in  
8 injury or death and in some it will not, but in all  
9 cases it carries that potential.

10                  CHIEF JUSTICE ROBERTS: Doesn't whether it's  
11 aggressive or not depend upon how it happened? I mean,  
12 it could be -- I mean, the flight puts in place the  
13 potential for -- for violence, I agree with that; but if  
14 somebody just, you know, jumps out between two cars  
15 while the fellow's fleeing, how is his conduct changed  
16 to aggressive?

17                  MR. WALL: It's --

18                  CHIEF JUSTICE ROBERTS: It's not like he --  
19 it's not like he's aiming for the guy. I mean, it's  
20 putting it in a dangerous situation. It's purposeful.  
21 Again, I'll give you violent in the sense that it has  
22 that potential. But he didn't want to hit the -- the  
23 person. It's not aggression against the person.

24                  MR. WALL: Chief Justice, there's no  
25 question that on a case by case basis you could flee in



1 a way that was not very risky, that was not very  
2 violent, or not very aggressive. And if this Court went  
3 on a case-by-case basis, then we'd look at the conduct  
4 here and the government would still win, because this is  
5 the typical case.

6 JUSTICE SCALIA: But he's saying even when  
7 it's risky it's not aggressive.

8 MR. WALL: And I -- my --

9 JUSTICE SCALIA: You can be risky and not  
10 aggressive, can't you?

11 MR. WALL: Yes, on a case-by-case basis.  
12 But categorically, which is what this Court looks at,  
13 the conduct encompassed by the elements in the ordinary  
14 case, in the ordinary case, the character of the conduct  
15 is aggressive.

16 CHIEF JUSTICE ROBERTS: Who's he aggressing  
17 against? When someone sees the police and says I'm  
18 getting out of here and drives down the highway, say, at  
19 80 miles an hour, you know, 25 miles above the speed  
20 limit, who is he -- I'm sure it's not the right verb,  
21 but who is he aggressing against?

22 MR. WALL: Well, I don't know that he is  
23 aggressing against anyone, in the same way that if I  
24 recklessly I fire a gun into a large crowd of people,  
25 you know, I haven't aggressed against anyone in

1 particular. He's aggressed into anyone who strays into  
2 his field of flight and who could be injured by what is  
3 typically a high-speed flight and pursuit. So I don't  
4 -- there is no specific target, but that will be true of  
5 many of the crimes that are violent felonies, that the  
6 -- that the aggressive nature of the conduct is directed  
7 generally.

8 CHIEF JUSTICE ROBERTS: No, it's not that  
9 there's no specific target. There's no target. What  
10 this guy hopes is that nobody gets in his way.

11 MR. WALL: Well, so, too, with the burglar,  
12 who hopes that no one will come home; maybe even the  
13 arsonist who hopes no one is in the house; or the  
14 extortionist who hopes someone will pay, so he won't  
15 have to use violence.

16 JUSTICE SCALIA: But they're mentioned;  
17 they're mentioned. They're mentioned, and you're trying  
18 to get this in under the residual clause.

19 MR. WALL: That's right, Justice Scalia, a  
20 residual clause that, as you yourself have recognized,  
21 is extremely broadly worded. It -- it abstracts out as  
22 the quality of the enumerated offenses that they create  
23 a serious potential risk of physical injury to others.  
24 And I can't find any metric along which flight doesn't  
25 do that, whether one looks through the cases, media

1 reports, the statistical data, whatever one -- Indiana,  
2 nationally -- whatever standard or metric one uses, this  
3 is an extremely risky offense to others.

4 And I, you know -- so it's very difficult to  
5 figure out what test, what interpretation of that  
6 language would exclude this from ACCA.

7 JUSTICE BREYER: Suppose you have one of 38  
8 States which treat this -- treat the general offense as  
9 a misdemeanor, and then make it a felony if you put  
10 somebody at risk. Just reading that statute you would  
11 think those 36 States when they have the general offense  
12 do something where the guy acted pretty trivially; and  
13 where it's a felony, he actually puts somebody at risk,  
14 sped off, wouldn't that be your normal instinct in just  
15 guessing from the -- from the language?

16 MR. WALL: Justice Breyer the --

17 JUSTICE BREYER: How are we supposed to  
18 treat those, where there's a misdemeanor --

19 MR. WALL: The States --

20 JUSTICE BREYER: In your opinion, it's just  
21 a misdemeanor, we also treat it the same way; say it's a  
22 violent felony?

23 MR. WALL: The States treat it differently.  
24 Some, as Indiana --

25 JUSTICE BREYER: All right. Then that's

1 actually my question. Are we supposed to, in this  
2 Federal statute, try to track whether it's a  
3 misdemeanor, what the language is? We're going to have  
4 a nightmare of a Federal law for States to -- for judges  
5 to figure this out. I mean, every little variation in  
6 thousands and thousands of possible variations could  
7 make a difference as to whether it's violent or not,  
8 depending on data which no one will have.

9 MR. WALL: Justice Breyer, I don't think so.  
10 If the Court were to affirm here, what that would mean  
11 is that the offense of flight is a violent felony  
12 insofar as you have a predicate conviction under a State  
13 statute where it's been punishable by up to a year, and  
14 so it could qualify for ACCA coverage.

15 Now, some State convictions will have been  
16 treated as misdemeanors and won't be eligible for ACCA,  
17 but to the extent the State treats it as a felony it's  
18 risky enough to satisfy the residual clause. Now, if  
19 the Court treats (A) and (B) as what they are not, which  
20 is greater or lesser, then yes, I think there will be  
21 problems with various State statutes, as Justice Kagan  
22 pointed out, and this Court may have to clear it up down  
23 the road.

24 But if it treats this basic offense as what  
25 it is, not a greater or lesser, but alternative means of

1 proving a single offense that is risky, that would, I  
2 think, would take care of all flight cases going  
3 forward.

4 JUSTICE KAGAN: Well, on this question of  
5 whether this statute is greater or lesser, it's greater  
6 or lesser if you just understand (b)(1)(A) as confined  
7 to vehicular flight. In other words, if one looks only  
8 at vehicular flight, then (b)(1)(A) and (b)(1)(B) are  
9 indeed greater or lesser offenses.

10 MR. WALL: Yes, Justice Kagan, if you're  
11 looking only -- I take it you're looking only at the  
12 vehicle prong of (B), but the test in Schmuck is whether  
13 it's impossible to -- to commit the greater without  
14 committing the lesser. It's not impossible to commit  
15 (B), because it does have the two other prongs, and I  
16 think --

17 JUSTICE KAGAN: Do you think that if I flee  
18 in a vehicle, I could be prosecuted under both and  
19 receive sentences under both?

20 MR. WALL: No, I don't think so, because I  
21 think the -- there is no evidence -- no case in Indiana  
22 that I'm aware of. There's no evidence that the General  
23 Assembly intended these to be multiple punishments for a  
24 single incident. There are alternative means of proving  
25 a single offense. The State has always treated them

1 that way, so far as I can tell. I've not -- I've seen  
2 prosecutions since 1998 that were all under (A). I  
3 haven't seen anything that went under (A) and (B) and  
4 tried to get multiple punishments, and I think that  
5 would be a serious problem.

6 JUSTICE SOTOMAYOR: I'm a little confused by  
7 what you said and what point you're making. You don't  
8 think that (B) is a lesser included of (A)? Is that --  
9 no, that (A) is a lesser included of (B)?

10 MR. WALL: Your Honor, the government does  
11 not think that (A) is a lesser included of (B).

12 JUSTICE SOTOMAYOR: You can't commit (B)  
13 without committing (A) first. (B) has just one  
14 additional element, but all of the elements of (A) are  
15 part of the elements of (B), so how can it not be a  
16 lesser included?

17 MR. WALL: Well, the element of (B) that's  
18 different, Justice Sotomayor, is the "while committing  
19 any offense described in subsection (A)." So you can be  
20 resisting an officer or you can be obstructing the  
21 service of process and you can endanger someone in  
22 various ways, including with a vehicle, and you will  
23 have violated (B), and you can be prosecuted for that,  
24 and there are cases in Indiana like that. And you have  
25 not -- you have not been fleeing in a vehicle from an

1 officer at any point, so you haven't violated (A).

2 So the existence of the other prong there --  
3 that's what I was trying to get into with Justice  
4 Kagan -- means that this is not a greater or lesser  
5 under Schmuck.

6 JUSTICE KAGAN: But as a vehicular flight  
7 only, it would be greater or lesser.

8 MR. WALL: If you divided up the prongs  
9 under Schmuck, but I think the Schmuck -- what follows  
10 logically from that test is that you look at the entire  
11 offense and ask whether it's possible to commit it  
12 without committing the lesser, and that test is not  
13 satisfied here. I don't think you carve it up prong by  
14 prong.

15 JUSTICE SCALIA: I'm -- this is greater or  
16 lesser for purposes of what? Double jeopardy?

17 MR. WALL: No, it's greater or lesser for  
18 purposes of Petitioner's argument that you should assume  
19 that every risky flight gets prosecuted under (B) and  
20 hence (A) is a non-risky offense, and that argument  
21 fails for multiple reasons, one of which I was trying to  
22 spin out. It's not even true that this is greater or  
23 lesser.

24 JUSTICE SCALIA: I just don't follow that  
25 argument. I mean, it -- it seems to me that, yes, you

1     could -- you could run afoul of (B) by committing an  
2     offense under subsection little (a) in some other ways,  
3     but if you run afoul of (B) by committing the offense  
4     of -- of flight from a law enforcement officer, it seems  
5     to me that that automatically includes (A).

6                   MR. WALL: Well, except that there are two  
7     alternative means of proving the same offense under  
8     State law. They have the same State law penalties, so  
9     the prosecutors can go under (A) or they can go under  
10    (B). And as far as I can tell, for the last, say, 13  
11    years, they've been going under -- they've been going  
12    under (A).

13                   So it's not -- Justice Scalia, it's not --  
14    there are aggravators in this statute for injury or  
15    death. They're the ones that are in (2) and (3), the  
16    class (C) and class (B) felonies, but this is not a  
17    greater or lesser. It's -- they're alternative means.  
18    I think only if you've got -- set that aside would you  
19    get to the sort of Schmuck analysis that I was going  
20    through with -- with Justice Kagan.

21                   I think one of the important things to  
22    recognize about this offense is that, you know, in  
23    the -- 50 percent of these offenders are ultimately  
24    charged with a violation that's unrelated to their  
25    flight, a serious felony unrelated to their flight.



1                   And the reason I think that's important is  
2     because what you will look -- the reason that they're  
3     traveling at such high speeds, the reason they're  
4     evading officers, the reason the typical case is not  
5     someone just going a couple blocks and stopping, is  
6     because they've got drugs in the car or guns, they have  
7     parole violations or outstanding warrants. It is the  
8     background against which I think you have to assess the  
9     character of the -- of the conduct here. And whether  
10    you're looking at it under risk or under the character  
11    of the conduct, the government submits that it easily  
12    satisfies the residual clause.

13                   If there are no further questions, thank  
14    you.

15                   CHIEF JUSTICE ROBERTS: Thank you, Mr. Wall.

16                   Mr. Marsh, you have four minutes remaining.

17                   REBUTTAL ARGUMENT OF WILLIAM E. MARSH

18                   ON BEHALF OF THE PETITIONER

19                   MR. MARSH: Thank you, Mr. Chief Justice.

20                   I would suggest that it's helpful to start  
21    to look at the in-kind part of the Begay test on a more  
22    general level than we've been discussing.

23                   JUSTICE SOTOMAYOR: Could you succinctly  
24    tell me how this is any less purposeful, aggressive, or  
25    violent than escape from custody? What's your best

1 answer to why this is just not identical to escape,  
2 which is a fleeing-from situation just as this is.

3 MR. MARSH: Justice Sotomayor, the basic  
4 distinction is that the person who's charged with  
5 escape, assuming that escape means escape from a secure  
6 institution or from a person, is that the person is in  
7 custody, and it takes, in the ordinary case, aggression  
8 and violence to get out of the custody of that person.  
9 The person who is fleeing is trying to avoid being  
10 taken.

11 JUSTICE SOTOMAYOR: Well, here an officer  
12 has told you to stop. They're trying to effect custody.  
13 I don't know what the aggression or violence is, other  
14 than, you know, breaking a window, doing something. It  
15 doesn't require, the escape, that you actually injure  
16 someone to get out. It's just that you run away.

17 MR. MARSH: I think the phrase that you just  
18 used is the distinction that I was referring to. The  
19 person who is fleeing is trying to avoid being in  
20 custody. They're acting in a -- instead of going toward  
21 the officer and resisting, they're going away from the  
22 officer. The person who is in custody has to use some  
23 kind of force, and in Johnson, of course the -- this  
24 Court referred to violent as the --

25 JUSTICE ALITO: That's not true. There

1 are -- you can -- there are prison escapes all the time  
2 where it is done through subterfuge.

3 MR. MARSH: That's -- that's true, Justice  
4 Alito, but as the Court held in James, finding an  
5 example of a case that would not be violent does not  
6 solve the ordinary case. The ordinary case, I would  
7 suggest, requires something more than that.

8 CHIEF JUSTICE ROBERTS: Well, it's, for me,  
9 anyway, an important question. I'll -- I'm not sure the  
10 ordinary case does. I assume the ordinary prison escape  
11 is -- I don't know -- over the wall, under the tunnel  
12 or, you know, while the guard's looking a different way,  
13 or some -- I don't know that it's typical that when the  
14 guard is there, you say, now's my chance. The typical  
15 case doesn't involve aggression.

16 MR. MARSH: Of course the ordinary case or  
17 the typical case, Mr. Chief Justice, is that the Court  
18 needs to look at the conduct encompassed by the elements  
19 of the statute, and so we would have to look at exactly  
20 what the statute requires.

21 The circuit courts have been very divided on  
22 escape. In my circuit, the Seventh Circuit, the Federal  
23 statute, 751, has been held not to be -- which is a  
24 general escape statute -- not to be a violent felony.  
25 But, again, the Court talks about the ordinary case in

1 the James case for the purpose of disabusing the idea  
2 that one can't get out from under the violent felony  
3 designation just by coming up with a hypothetical case  
4 or an example where it can be done without -- without  
5 violence.

6 Here, I would suggest that counsel has just  
7 created for the Court some kind of a hypothetical case  
8 to define the typical or ordinary case. This Court has  
9 never done that, and this Court said in James that it's  
10 important to stick to the conduct encompassed by the  
11 elements of the offense, because if we start factoring  
12 in other kinds of conduct, as several of the things  
13 which have been mentioned by counsel for the government,  
14 that begins to raise Apprendi problems, which is another  
15 whole issue. But the Court said in James, and I would  
16 acknowledge is the law, that so long as the  
17 determination as to whether there's a serious potential  
18 risk of physical injury is made by focusing on the  
19 conduct encompassed by the elements of the offense, then  
20 there's not an Apprendi problem.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
22 The case is submitted.

23 MR. MARSH: Thank you.

24 (Whereupon, at 10:58 a.m., the case in the  
25 above-entitled matter was submitted.)

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